2011 IL App (4th) 100272-U

Filed 9/30/11

NO. 4-10-0272

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KENNETH W. LAY, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Vermilion County No. 07CF92 Honorable Craig H. DeArmond, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding that the trial court did not err by dismissing the defendant's petition for postconviction relief because it was frivolous and patently without merit.

¶ 2 Following an April 2008 trial, a jury convicted defendant, Kenneth W. Lay, of (1) two counts of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2006)), (2) unlawful restraint (720 ILCS 5/10-3(a) (West 2006)), and (3) aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)). The trial court later sentenced defendant to concurrent sentences of (1) 364 days for each domestic-battery count, (2) 4 years for unlawful restraint, and (3) 20 years for aggravated domestic battery.

¶ 3 Defendant appealed, and this court affirmed defendant's convictions and sentences for domestic battery and aggravated domestic battery but vacated defendant's four-year extended-

term sentence for unlawful restraint and, instead, imposed a nonextended term of three years. *People v. Lay*, No. 4-08-0480 (June 26, 2009) (unpublished order under Supreme Court Rule 23) *appeal denied*, 235 Ill. 2d 598, 424 N.E.2d 458 (2010).

¶ 4 In December 2009, defendant *pro se* filed a petition for postconviction relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)), asserting, through several separate allegations, that he was denied the effective assistance of trial counsel. In March 2010, the trial court dismissed defendant's petition pursuant to section 122-2.1(a)(2) of the Act (725 ILCS 5/122-2.1(a)(2) (West 2010)), finding that it was frivolous and patently without merit.

¶ 5 Defendant appeals, arguing that the trial court erred by dismissing his petition for postconviction relief because he stated the gist of a constitutional claim. We disagree and affirm.

¶ 6 I. BACKGROUND

¶ 7 A. The State's Charges

¶ 8 In December 2007, the State charged defendant with (1) criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2006)) and (2) two counts of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2006)). In March 2008, the State charged defendant with the following additional charges: (1) criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)), (2) unlawful restraint (720 ILCS 5/10-3(a) (West 2006)), and (3) aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)).

¶ 9 B. The Parties' Opening Statements

¶ 10 1. *The Pertinent Portion of the State's Opening Statement*

¶ 11 In explaining to the jury the events immediately following a police dispatch

indicating that a woman–later identified as P.L.–had been assaulted, the prosecution stated the following:

> "The police arrive. [P.L.] goes to the hospital. Defendant is taken into custody then, and you'll hear a statement from the defendant where he admits to punching [P.L.], possibly choking her, shoving her down, but he will tell you that she [had] a box cutter, that he got cut on his finger not requiring stitches, not requiring bleeding, not anything, no hospitalization and–but he will tell you in the statement that when asked by the officer what–why would [P.L.] be saying these things that he will tell you, well, partly because of my background, partly because of the severity of the beating this time."

¶ 12 2. *The Pertinent Portion of Defendant's Opening Statement*

¶ 13 During defendant's opening statement, his counsel stated, in part, the following:

> "[P.L. and defendant] lived together in Chicago ***. They have both used alcohol, marijuana and cocaine throughout their relationship and drugs were used the night of this incident. [P.L.] does know as counsel stated of my client's past criminal record and that frankly she can tell a story and get him in a lot of serious trouble and that's what brings us here today. He has never been convicted of any charges involving [P.L.] but he does have an extensive criminal past."

¶ 14 B. The Evidence Presented at Defendant's Jury Trial

¶ 15 The evidence presented at defendant's April 2008 jury trial consisted of testimony from (1) Danville police officer Phil McDonald, (2) Danville police detective Mike Bransford, (3) P.L., and (4) defendant. This evidence showed the following.

¶ 16 On the evening of December 23, 2007, McDonald responded to a police dispatch involving the assault of a woman in her apartment. McDonald arrived at an apartment, where he saw three individuals later identified as (1) defendant; (2) P.L.; and (3) the apartment's owner, Penny. McDonald observed that P.L. (1) was "extremely upset" and "frantic," (2) was limping on her right leg, and (3) had dried blood in her ear. P.L. told McDonald that defendant had sexually assaulted her. Shortly thereafter, paramedics transferred P.L. to the hospital. McDonald then interviewed defendant, who stated that P.L. had cut his finger with a box cutter. McDonald observed a "small cut" on defendant's finger but could not recall seeing any blood. Defendant refused medical treatment for his injury.

¶ 17 McDonald then traveled to the hospital to obtain P.L.'s statement and determine her medical status. At the hospital, McDonald noticed that P.L. had (1) a swollen knee, (2) abrasions on the left side of her face, (3) bruises on her neck, and (4) deep bruises to her arms. When McDonald concluded his interview, P.L. gave him a note that she had written. McDonald later performed a records search that showed P.L. had an order of protection against defendant.

¶ 18 P.L. testified that in October 2007, she moved from Chicago into an apartment complex in Danville, where she lived with her 10-year-old daughter. Before moving, P.L. obtained an order of protection against defendant, whom she had dated for two years. That order allowed defendant to contact P.L. but prohibited him from abusing her. Despite ending her

relationship with defendant before her relocation, P.L. allowed him to stay in her Danville apartment on "some weekends" prior to the Thanksgiving holiday.

¶ 19 In the early evening of December 22, 2007, P.L. was walking toward her apartment complex when she noticed defendant. P.L. attempted to avoid defendant by running away, but defendant caught her. Defendant told P.L. in a demanding tone that he "wanted to talk to her." P.L. was afraid of defendant and did not want to talk to him because she knew that he wanted to rekindle their relationship. Eventually, P.L. allowed defendant into her apartment because she believed that they could talk in a reasonable manner. At that time, P.L.'s apartment was the only occupied unit on the second floor of her apartment building. (P.L.'s daughter was in Chicago during P.L.'s encounter with defendant.)

¶ 20 After P.L. and defendant entered her apartment, defendant became "angry" and "irate" because P.L. ran away from him and did not want to talk. P.L. feared for her life but tried to remain calm. P.L. told defendant that she did not want a relationship with him. As P.L. repeated her rejection, defendant became angrier. Defendant then (1) grabbed P.L.'s neck, choking her; (2) pulled her hair; (3) struck her near her left ear and mouth, causing both to bleed; and (4) verbally abused her.

¶ 21 P.L. grabbed a box cutter that a maintenance man had left in her apartment, which she planned to use if defendant attempted to choke her again. As she lay on the floor in the fetal position, defendant pried the box cutter from P.L.'s hands but, in doing so, he cut his finger. When defendant went to the bathroom, P.L. tried to get up but could not because of pain in her leg. P.L. stated that during her struggle with defendant, he had pulled her right leg, and she "heard something snap." P.L. crawled to her bedroom while defendant was in the bathroom and

removed her pants to check her leg. When defendant returned, P.L. described his demeanor as "still ranting and raving."

¶ 22 P.L., who was sitting on her bed in only her shirt and underwear, attempted to devise a plan to leave her apartment. Defendant told P.L. that if he could not have her, no one could, and he then demanded sexual intercourse. P.L. explained that she could not and did not want to have sex because she was menstruating. Defendant then pushed P.L. back onto the bed, grabbed her head, and demanded oral sex. P.L. refused, but defendant forced her to perform oral sex on him. Afterward, defendant remained in P.L.'s apartment and told her that she would not be leaving that night. P.L. later went to bed with defendant but stated that (1) defendant held her close throughout the night and (2) she remained awake because she was afraid.

¶ 23 The following morning, P.L. told defendant that she needed medical attention for her leg. Because P.L. did not have a phone, defendant left P.L.'s apartment and went to the apartment of a mutual friend named Penny to see whether Penny would allow P.L. to use her phone. When defendant left, P.L. wrote two notes requesting help. P.L. threw one of the notes out of her apartment window. P.L. then left her apartment, intending to give the second note to another friend who lived in her apartment building. P.L. ultimately gave the note to her friend's boyfriend and asked him to read it, but he did not. P.L. returned to her apartment. Immediately thereafter, defendant returned. Defendant told P.L. that Penny was home so they both went to her apartment. While at Penny's apartment, P.L. handed Penny a third note that she had written requesting help. Penny attempted to hold up the note to read it, but P.L. stopped her because defendant was in the room. P.L. took back the note and asked Penny to use her phone.

¶ 24 P.L. called her mother's cell phone and told her that (1) she was hurt and (2) she

needed "both of them," which was their family code for police and ambulance. P.L.'s mother called the police on her home phone and provided P.L.'s location and that she had been sexually assaulted by defendant, which was relayed to her by P.L. As time passed, P.L.'s anger increased as she recounted in her mind the details of her ordeal. Later, the Danville police knocked on Penny's door. P.L. spoke briefly to a police officer before paramedics transported her to the hospital. At the hospital, P.L. provided the same officer an oral statement and the handwritten note that she had taken back from Penny.

¶ 25 Bransford testified that on December 26, 2007, he conducted an audiotaped interview with defendant about the incident on December 22, 2007. (At trial, the State played the audiotape for the jury.) After defendant waived his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966)), defendant admitted to Bransford that he (1) punched P.L., (2) shoved her four or five times, and (3) may have choked her. Defendant denied forcing P.L. to have sexual intercourse with him, claiming that the last time he had sexual intercourse with P.L. was "a day or two prior to the incident." Defendant opined that P.L. made up the accusations to try to get him into trouble because (1) "she knew what his background was" and (2) he had "jumped on her a little too sever[ely] this time." Defendant also stated that he received an injury to his index finger on his right hand that Bransford described as a "scratch."

¶ 26 Defendant testified that he had (1) been in a relationship with P.L. for three years and (2) lived with P.L. at her Danville apartment from sometime in October 2007 until December 23, 2007. Defendant admitted that he neither had a key to the apartment nor was his name on the lease. However, on occasion, (1) he would leave the door unlocked so that he could return without waiting for P.L. or (2) P.L. would leave the door unlocked in anticipation of his arrival.

Defendant stated that he last had consensual intercourse with P.L. on December 21, 2007.

¶ 27 On December 22, 2007, defendant was waiting to enter the apartment he shared with P.L. After waiting more than an hour, P.L. returned, drinking a beer. P.L. opened the apartment door, and they both entered. P.L. then opened a bag of cocaine she brought with her. Sometime later, defendant picked up a pipe P.L. had been using to smoke cocaine. P.L. became angry, picked up a box cutter, and cut defendant's hand because she was not done using the pipe. Defendant went to the bathroom to clean the blood off his hand. When defendant returned, P.L. was in the bedroom still holding the box cutter. Defendant then hit P.L. three or four times because she had cut him. They both fell onto the bed and "wrestled around on the bed." Defendant stated that he only fought P.L. after she cut him with the box cutter. Defendant estimated that the entire altercation took approximately one minute.

¶ 28 Afterward, defendant cleaned the remaining blood from his clothes, changed his trousers, and went to bed with P.L. Defendant denied (1) scaring P.L. outside her apartment; (2) threatening P.L.; (3) having sexual contact with P.L. on December 22, 2007; (4) preventing P.L. from leaving her apartment; or (5) preventing P.L. from calling her mother. Defendant stated that his testimony concerning the incident on December 22, 2007, was consistent with the statements he had provided to Bransford. Thereafter, the following exchange took place:

"[DEFENDANT'S COUNSEL]: Why do you feel like [P.L.] lied about forced sex?

[DEFENDANT]: Because of my background.

[DEFENDANT'S COUNSEL]: What background?

[DEFENDANT]: I have an extensive criminal background

as far as –

[DEFENDANT'S COUNSEL]: Pardon?

[DEFENDANT]: Huh?

[DEFENDANT'S COUNSEL]: What type of background?

[DEFENDANT]: Background as far as armed robbery, murder, you know what I mean, those sorts of things, drugs, you know –

[DEFENDANT'S COUNSEL]: Criminal background?

[DEFENDANT]: Right, extensive criminal background, yes, sir. But never – you know, never –

* * *

[DEFENDANT'S COUNSEL]: Do you have an extensive criminal background?

[DEFENDANT]: Extensive criminal background, but as far as *** ever laying there taking anything from a woman, right.

[DEFENDANT'S COUNSEL]: Have you ever been convicted of any sexual crimes?

[DEFENDANT]: No, sir."

¶ 29 On cross-examination, defendant admitted that his criminal history included convictions for possession of heroin and cocaine and that he had (1) punched P.L. three times, (2) grabbed her, and (3) shoved her after she cut him. Defendant also admitted that during his December 26, 2007, audiotaped interview with Bransford, he described the cut he sustained to

his hand as starting at the tip of his left index finger down to its base and to the bone. Defendant claimed that he did not receive any medical treatment despite asking for medical assistance from the officer who transported him after his arrest. Defendant managed to stop most of the bleeding by wrapping his finger in tissue paper and applying force before he reached the public safety building. Defendant confirmed that in his audiotaped interview with Branford, he stated that he last had sexual contact with P.L. on December 22 or 23, 2007.

¶ 30 C. The Jury's Verdict and the Trial Court's Sentence

¶ 31 Following the presentation of evidence and argument, the jury (1) convicted defendant of (a) two counts of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2006)), (b) unlawful restraint (720 ILCS 5/10-3(a) (West 2006)), and (c) aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)), and (2) acquitted him of (a) criminal sexual abuse (720 ILCS 5/12-15(a)(1) (West 2006)) and (b) criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)). In May 2008, the trial court sentenced defendant as previously stated.

¶ 32 D. Defendant's Initial Appeal

¶ 33 Defendant appealed, and this court affirmed defendant's convictions and sentences for domestic battery and aggravated domestic battery but vacated defendant's four-year extended-term sentence for unlawful restraint and instead, imposed a nonextended term of three years. *Lay*, No. 4-08-0480.

¶ 34 E. Defendant's Postconviction Petition

¶ 35 In December 2009, defendant *pro se* filed a petition for postconviction relief under the Act, asserting, through several separate allegations, that he was denied the effective assistance of trial counsel. In March 2010, the trial court summarily dismissed defendant's

petition pursuant to section 122-2.1(a)(2) of the Act, finding that it was frivolous and patently without merit.

¶ 36 This appeal followed.

¶ 37 II. THE TRIAL COURT'S DISMISSAL OF DEFENDANT'S PETITION FOR POSTCONVICTION RELIEF

¶ 38 A. Proceedings Under the Act and the Standard of Review

¶ 39 A defendant may proceed under the Act by alleging that "in the proceedings which resulted in his or her conviction[,] there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both[.]" 725 ILCS 5/122-1(a)(1) (West 2010). "In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition." *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010). "At the first stage, 'the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit.' " (Emphasis in original.) *Andrews*, 403 Ill. App. 3d at 658, 936 N.E.2d at 652 (quoting *People v. Phyfiher*, 361 Ill. App. 3d 881, 883, 838 N.E.2d 181, 184 (2005)). "To withstand dismissal at the first stage, the petition need only state the gist of a constitutional claim for relief." *People v. Foster*, 391 Ill. App. 3d 487, 491, 909 N.E.2d 372, 377 (2009).

¶ 40 In determining whether a defendant has stated the gist of a constitutional claim in the context of a petition that asserts an ineffective-assistance-of-trial-counsel claim, the supreme court provided the following guidance:

"In answering this question, we are guided by the standard

> set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2025 (1984), for determining whether counsel's assistance was ineffective. To prevail on a claim of ineffective assistance under *Strickland*, a defendant must show *both* that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense. [Citation.] At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness *and* (ii) it is arguable that the defendant was prejudiced." (Emphases added.)
> *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009).

Prejudice is shown when a reasonable probability exists that, but for counsel's errors, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶ 41 If a defendant has been sentenced to imprisonment and the trial court determines that his postconviction petition is frivolous or patently without merit, the court shall dismiss the petition by written order. 725 ILCS 5/122-2.1(a)(2) (West 2010). We review *de novo* a first-stage dismissal of a petition under the Act. *Foster*, 391 Ill. App. 3d at 491, 909 N.E.2d at 377.

¶ 42 B. Defendant's Ineffective-Assistance-of-Counsel Claim

¶ 43 Defendant argues that the trial court erred by dismissing his petition for postconviction relief because he stated the gist of a constitutional claim. We disagree.

¶ 44 As previously stated, a petition alleging ineffective assistance may not be summarily dismissed–as happened in this case–if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. In his December 2009 petition for postconviction relief, defendant asserts the following with regard to his claim that his counsel's performance fell below an objective standard of reasonableness:

> "Here, counsel elicited the Petitioner's criminal background including armed robbery; murder, and drug convictions, and he did so primarily because he didn't spend the appropriate necessary time with Petitioner regarding his testimony. Thus, trial counsel only spent 20 minutes with Petitioner prior to trial and not once did trial counsel go over a dry-run with Petitioner with Questions-Answers so that trial counsel would know what not to ask Petitioner."

Citing *People v. Montgomery*, 47 Ill. 2d 510, 516, 268 N.E.2d 695, 698 (1971), defendant also claims that his counsel was ineffective in that he failed to file a motion *in limine* to exclude two of his convictions, which could not have been used for impeachment purposes because they were more than 10 years old.

¶ 45 We need not reach the merits of defendant's claim that his trial counsel's performance fell below an objective standard of reasonableness, however, because defendant failed to show how he was prejudiced by his trial counsel's purported ineffectiveness. In this regard, defendant asserts in his brief to this court the following:

> "The trial court's assertion that [defendant] did not show

> how any error would have resulted in a different outcome, especially when he was acquitted of the sexual assault offenses, shows a misconception of the prejudice prong."

Citing *People v. Fletcher*, 335 Ill. App. 3d 447, 455, 780 N.E.2d 365, 371 (2002), defendant posits that instead of focusing on the "different outcome" criteria, the trial court should have focused on whether he received a fair trial–that is, whether his jury's verdict is worthy of confidence. Although we view defendant's prejudice assertion as a distinction without a difference, we nonetheless are confident that the results of defendant's trial would not have been different even if neither party had mentioned defendant's criminal history.

¶ 46 In this case, the jury convicted defendant of (1) two counts of domestic battery, (2) unlawful restraint, and (3) aggravated domestic battery. The record shows that the evidence the State presented to prove defendant's domestic-battery and aggravated-domestic-battery convictions originated from defendant's (1) statements he made to police that he (a) punched P.L., (b) shoved her four or five times, and (c) may have choked her, and (2) testimony that he (a) punched P.L. three times, (b) grabbed her, (c) shoved her, and (d) had "jumped on her a little too sever[ely] this time," which resulted in an injury to P.L.'s leg. In addition, despite defendant's testimony to the contrary, the State elicited P.L.'s testimony that defendant prevented her from leaving her apartment to prove the unlawful-restraint charge, which the jury apparently found credible. Thus, even if we were persuaded by defendant's argument that his trial counsel's performance fell below an objective standard of reasonableness–an argument of which we are skeptical–we conclude that defendant's exclusion of his prior criminal history would not have resulted in defendant's acquittal given the record before us. Accordingly, we reject defendant's

argument that the trial court erred by dismissing his petition for postconviction relief because he stated the gist of a constitutional claim.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 49 Affirmed.